

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB FTSC 13-02 Relating to Florida Sales and Use Tax

**SPONSOR(S):** Finance & Tax Subcommittee

**TIED BILLS:**           **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Finance & Tax Subcommittee		Flieger	Langston

### SUMMARY ANALYSIS

Under Florida law, sales of tangible personal property are subject to the sales and use tax unless specifically exempt. However, it is difficult for states to collect the tax due on sales made from out-of-state vendors because the state must rely on either out-of-state vendors to voluntarily collect the sales tax or purchasers to voluntarily remit the use tax themselves. A state's ability to compel an out-of-state seller to collect and remit sales tax is limited by the Commerce Clause of the U.S. Constitution. The Supreme Court has held it is unconstitutional for a state to require an out-of-state retailer to collect sales tax unless that out-of-state retailer has a "physical presence" to create sufficient connection or "nexus" with that state (e.g. offices, showrooms, etc.).

The proposed committee bill amends s. 212.0596, F.S., to provide that a "mail order sale" includes the sale of tangible personal property over the internet. The bill adds in-state representatives of a dealer, in addition to the current law inclusion of in-state agents of that dealer, to cause a dealer to have nexus. The bill further amends s. 212.0596 to establish that an out-of-state dealer has nexus with Florida and is therefore obligated to collect tax if a person other than the dealer (excluding common carriers) engages in certain activities within Florida that assists the out-of-state dealer in making sales within this state.

The bill also establishes a rebuttable presumption that an out-of-state dealer who makes "mail order sales" to Florida customers is required to collect taxes if the dealer enters into an agreement with one or more persons ("affiliates") within Florida under which the Florida affiliate refers (directly or indirectly) potential customers to the dealer. The bill requires annual gross receipts by the dealer of at least \$10,000 in sales by customers who are referred by affiliates within Florida before this presumption is created.

The definition of "dealer" in s. 212.06, F.S., is revised to include any person who uses within this state an office, distributing house, salesroom, or house, warehouse, or other place of business operated by any person other than a common carrier acting in the capacity of a common carrier.

The bill creates s. 212.0802, establishing a recurring sales tax holiday on clothing and school supplies. The length of the holiday will be determined each year by the Revenue Estimating Conference to reduce total sales tax collections by at least the amount of new collections received pursuant to the changes to the mail order sales statute in the bill.

The Revenue Estimating Conference has not evaluated the proposed committee bill, but on March 1, 2013, it estimated that substantially similar language would have an indeterminate positive revenue impact on state and local government in the first year of implementation and an indeterminate revenue impact of unknown direction each year subsequently.

The proposed committee bill has an effective date of February 1, 2014.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Current Law

###### Florida Sales and Use Tax

Chapter 212, F.S., contains the statutory provisions authorizing the levy and collection of Florida's sales and use tax, as well as the exemptions and credits applicable to certain items or uses under specified circumstances. A 6 percent sales and use tax is levied on sales or rental of most tangible personal property, admissions, storage, rentals of transient accommodations, rental of commercial real estate, and a limited number of services.<sup>1</sup> The statutes currently provide more than 200 different exemptions.<sup>2</sup> Sales tax is added to the price of the taxable goods or service and collected from the purchaser at the time of sale.

In conjunction with that sales tax, a use tax of 6 percent is levied on tangible personal property when it is used, consumed, distributed, or stored in Florida. For example, use tax is owed when:<sup>3</sup>

- A taxable item is purchased in Florida and the sales tax is not collected;
- An item is tax-exempt when purchased because the taxpayer intended to resell it, but the item is used in a business or for personal use; or
- A taxable item is purchased outside Florida and is brought or delivered into the state within 6 months of the purchase date, and sales tax was not collected at time of purchase.

If the item brought into Florida is subject to tax, a credit is allowed for equivalent taxes paid to another state, a U.S. territory, or Washington, D.C. Credit is not given for taxes paid to another country.

The Florida Department of Revenue ("DOR") is responsible for administering, collecting, and enforcing all sales and use taxes. Collections of discretionary sales surtaxes received by DOR are returned monthly to the county imposing the tax. Further, there are several state-shared revenue programs that allocate some portion of the state sales and use tax to local governments.<sup>4</sup> A few revenue sharing programs require that the county or municipality meet certain criteria to be eligible to receive funds. While there are restrictions on the use of some shared revenues, proceeds derived from shared sales tax revenues may be used for the general revenue needs of local governments.<sup>5</sup>

###### Local Discretionary Sales Surtaxes

Sections 212.054 and 212.055, F.S., authorize Florida counties to charge discretionary sales surtaxes on all transactions subject to the state sales and use tax. Only those surtaxes specifically designated may be levied.

Section 212.055, F.S., authorizes counties to impose eight local discretionary sales surtaxes on all transactions occurring in the county subject to the state tax imposed on sales, use, services, rental, admissions, and other transactions and on communications services as defined in ch. 202, F.S.<sup>6</sup> The maximum discretionary sales surtax that any county can levy depends upon the county's eligibility for the taxes listed in s. 212.055, F.S. Currently, the highest surtax imposed is 1.5 percent in several counties;<sup>7</sup> however, the theoretical maximum rate ranges between 2 percent and 3.5 percent,

<sup>1</sup> Of the limited services that are taxable, some, such as cable, are taxed at a higher rate.

<sup>2</sup> For a list of exemptions and history, see REC, 2012 Florida Tax Handbook. Exemptions are estimated to total about \$10 billion.

<sup>3</sup> Department of Revenue, Florida's Sales and Use Tax, available at [http://dor.myflorida.com/dor/taxes/sales\\_tax.html#tab1](http://dor.myflorida.com/dor/taxes/sales_tax.html#tab1) (last visited 1/31/2013).

<sup>4</sup> See, s. 212.20, F.S., for provisions governing this distribution

<sup>5</sup> For more information see REC, 2012 Florida Tax Handbook.

<sup>6</sup> The tax rates, duration of the surtax, method of imposition, and proceed uses are individually specified in s. 212.055, F.S. General limitations, administration, and collection procedures are set forth in s. 212.054, F.S.

<sup>7</sup> See DOR Form DR-15 DSS, "Discretionary Sales Surtax Information", available at <http://dor.myflorida.com/dor/forms/2013/dr15dss.pdf> (last visited 1/31/2013).

depending on the specifics of each individual county.<sup>8</sup> In general, the levy of each particular tax is subject to county voter approval, though there are exceptions.

The discretionary sales surtax is based on the rate in the county where the taxable goods or services are sold, or delivered into, and is levied in addition to the state tax. The sale is not subject to the tax if the property or service is delivered within a county that does not impose a surtax. The surtax does not apply to sales price above \$5,000 on any item of tangible personal property. This \$5,000 cap does not apply to the sale of any service, rentals of real property, or transient rentals.

#### Internet Sales and Out of State Vendors<sup>9</sup>

Under Florida law, every sale of tangible personal property is subject to sales tax unless specifically exempt. Sales made over the internet are not exempt from the provisions of ch. 212, F.S.<sup>10</sup> However, it is difficult for states to collect the tax due on sales made by out-of-state vendors because the state must rely on either out-of-state vendors to voluntarily collect the sales tax or purchasers to voluntarily remit the use tax themselves. A state's ability to compel an out-of-state seller to collect and remit sales tax is limited by the Commerce Clause of the U.S. Constitution.<sup>11</sup> As regulation of interstate commerce is exclusively the domain of the U.S. Congress,<sup>12</sup> states may not regulate interstate commerce without Congressional authorization. In Quill Corp. v. North Dakota, 504 U.S. 298 (1992), the Supreme Court ruled that it is unconstitutional under the Commerce Clause for a state to require an out-of-state retailer to collect sales tax unless that out-of-state retailer has a "physical presence" to create sufficient connection or "nexus" with that state (e.g. offices, showrooms, etc.). The Supreme Court held that requiring retailers to comply with numerous jurisdictions' tax laws would be overly burdensome.

Currently, s. 212.0596, F.S., defines a "mail order sale" as, "a sale of tangible personal property, ordered by mail or other means of communication, from a dealer who receives the order in another state of the United States, or in a commonwealth, territory, or other area under the jurisdiction of the United States, and transports the property or causes the property to be transported, whether or not by mail, from any jurisdiction of the United States, including this state, to a person in this state, including the person who ordered the property."<sup>13</sup>

Section 212.0596(2), F.S., provides requirements for dealers doing mail order business in Florida to collect and remit Florida sales tax if the dealer has nexus with Florida, and provides what activities constitute nexus for purposes of mail order sales. These include when:

- The dealer has agents in Florida who solicit or transact business on behalf of the dealer, whether the resulting mail orders result from or are related to the agent's solicitation or transaction of business;
- The property was delivered in Florida in fulfillment of a sales contract entered into in Florida where Florida law would apply under conflict of law rules;
- The dealer creates nexus with Florida by purposefully or systematically exploiting Florida's market by any media assisted, media facilitated, or media solicited means;
- Another U.S. jurisdiction uses its taxing power over the retailer in support of Florida's taxing power;
- The dealer is subject to service of process; or

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<sup>8</sup> See pg. 212-213 of the REC's 2012 Florida Tax Handbook, available at <http://edr.state.fl.us/Content/revenues/reports/tax-handbook/taxhandbook2012.pdf> (last visited 3/9/12)

<sup>9</sup>For more detailed background information, see The Florida Senate Budget Subcommittee on Finance and Tax, "Interim Report 2012-107: Application of Florida's Sales Tax to Sales by Out-of-State Retailers" (August 2011), available at <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/BFT1072012-107ft.pdf> (last visited 1/28/2013).

<sup>10</sup> See DOR, "Florida Consumer Information website on remitting use tax for Internet sales", available at <http://dor.myflorida.com/dor/taxes/consumer.html> (last visited 1/31/2013).

<sup>11</sup> Due Process requires some minimal contact with the taxing state for a taxing statute to be upheld. Upholding a statute against a Commerce Clause challenge is dependent upon satisfaction of a 4-part test: (1) the tax is applied to an activity with a substantial nexus with the taxing state; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the tax is fairly related to a service provided by the taxing state. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), rehearing denied, 430 U.S. 976 (1977).

<sup>12</sup> This is often referred to as the "Dormant" Commerce Clause.

<sup>13</sup> Section 212.0596(1), F.S.

- The dealer without nexus with Florida is a corporation that is a member of an affiliated group of corporations under s. 1504 of the Internal Revenue Code and whose members are eligible to file a consolidated federal corporate income tax return.

If the out-of-state retailer does not have sufficient nexus to require collection, and the goods are delivered in Florida, then use tax applies and is due from the purchaser. Consumers with use tax liability may voluntarily remit taxes due using Form DR-15MO.<sup>14</sup>

### E-Commerce

According to the U.S. Census Bureau about 70 percent of U.S. households have internet access.<sup>15</sup> The U.S. Census Bureau estimated that national e-commerce sales over the last 4 quarters total over \$216 billion dollars. This is roughly 5 percent of total retail sales in the U.S.<sup>16</sup>

Studies have estimated that amounts of lost sales tax revenue in Florida range from \$281 million to \$804 million in 2012.<sup>17</sup> In addition to the uncertainty created by attempting to estimate transactions that are not recorded, it is difficult to determine the exact amount of lost sales tax revenue due to the over 200 sales tax exemptions in Florida law (any tax exempt items purchased online do not cause a revenue loss) and the 67 different state and local taxing jurisdictions in the state (isolating the loss to individual taxing jurisdiction adds an additional layer of uncertainty).

### Federal Action

Since the power to regulate interstate commerce resides at the federal level, federal legislation appears to be the only comprehensive solution for states to grant them authority to require out-of-state retailers to collect sales tax. Multiple bills have been filed in Congress over the years to try to address the issue, generally by allowing those states which enact certain simplification and uniformity provisions to require collection by out-of-state sellers, but none have yet been enacted into law.<sup>18</sup>

### Actions of Other States

In the absence of federal action, several states have attempted to address the issue of taxing sales by out-of-state retailers through various methods.

Some states have passed legislation to fully participate in the Streamlined Sales and Use Tax Agreement.<sup>19</sup> These states adopt a uniform, simplified taxing system that would apply to all businesses collecting sales and use taxes. However, participation in collecting sales tax under the agreement is still voluntary for sellers who do not have nexus with a state.

In 2008, New York attempted to redefine what qualified as nexus to include arrangements where in-state companies (known as “affiliates”) refer business to an out-of-state dealer for a commission. This so-called “click-through” nexus law has been challenged and is currently in litigation.<sup>20</sup> Numerous other

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<sup>14</sup> <http://dor.myflorida.com/dor/forms/2010/dr15mo.pdf> (last accessed 3/11/13).

<sup>15</sup> 2010 data available at <http://www.census.gov/population/www/socdemo/computer.html> (last visited 1/28/2013).

<sup>16</sup> Quarterly Retail E-Commerce Sales, 3<sup>rd</sup> Quarter 2012, available at [http://www.census.gov/retail/mrts/www/data/pdf/ec\\_current.pdf](http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf) (last visited 1/28/2013).

<sup>17</sup> Bruce, Donald, William Fox, and LeAnn Luna, “State and Local Government Sales Tax Revenue Losses from Electronic Commerce”, University of Tennessee, April 8, 2009; Eisenach, Jeffrey A., and Robert E. Litan, “Uncollected Sales Taxes on Electronic Commerce: A Reality Check”, Empiris LLC, February 2010.

<sup>18</sup> In the 113th Congress, the “Marketplace Fairness Act” has been introduced as S. 336 and H.R. 684. Despite bipartisan sponsorship neither version has received a committee hearing as of March 9, 2013.

<sup>19</sup> Florida legislative action in response to this project includes s. 213.27, F.S., which grants DOR authority to enter into contracts with public or private vendors to develop and implement a voluntary system for sales and use tax collection and administration (ch. 2000-355, L.O.F.), and ch. 2001-225, L.O.F., which among other things, created the Simplified Sales and Use Tax Act, authorizing Florida to participate in the next phase of discussions with other states for the purposes of developing the project. See the SSUTA website for more information: <http://www.streamlinedsalestax.org/>.

<sup>20</sup> New York won at the trial level but the case was revived on appeal. See Overstock.com v. New York State Department of Taxation and Finance, New York State Court of Appeals No. APL-2012-00017, Amazon.com v. New York State Department of Taxation and Finance, New York State Court of Appeals No. APL-2012-00045.

states have followed New York's example and passed similar laws.<sup>21</sup> The response by e-commerce dealers has generally been to sever whatever affiliate arrangements they have within that state and continue to not collect sales tax on sales to that state. Additional nexus expansion legislation has attempted to extend the reach of state taxing authority through related corporations, shared trademarks, common ownership, and similar business relationship concepts where nexus with an out-of-state retailer can be achieved through in-state business activities.

Some states have elected to exempt certain retailers from collecting and remitting sales tax if the seller agrees to make a substantial investment in the state in the form of a distribution center and create a certain number of jobs. For example, South Carolina's statute requires a \$125 million investment and 2,000 new jobs in exchange for exemption from sales tax collections until 2016. Tennessee, California, Texas, Indiana, New Jersey, and Virginia have, through legislation or executive action, made arrangements with at least some e-commerce retailers where the retailer would begin collecting tax at a future date and either maintain currently operational distribution centers or invest in building additional facilities within that state.

### Sales Tax Holiday

There is no current statutory provision providing for an annual sales tax holiday. Since 1998, the Legislature has enacted eleven temporary periods during which certain clothing, footwear, books and school supply items were exempted from the state sales tax and county discretionary sales surtaxes. The length of the exemption periods has varied from 3 to 10 days. The type and value of exempt items has also varied. Clothing and footwear with values under \$100, \$75, or \$50 have been exempt at different times. Books valued at \$50 or less were exempt in five of the holidays. School supplies were included in recent holidays, with the value threshold increasing from \$10 to \$15 over time.

### **Proposed Changes**

The proposed committee bill amends Florida's laws related to what conduct by out-of-state retailers qualifies as nexus with this state and creates a revenue-neutral sales tax holiday funded by the increased collections caused by the changes made to the nexus provisions.

### Nexus

The bill amends s. 212.0596, F.S., to provide that a "mail order sale" includes the sale of tangible personal property over the internet as well as a sale made from a foreign country. The bill adds in-state representatives of a dealer, in addition to current law's inclusion of in-state agents of that dealer,<sup>22</sup> to cause a dealer to have nexus.

The bill provides, in addition to the nexus creation provisions of current law, that an out-of-state dealer has nexus with Florida and is therefore obligated to collect tax if a person other than the dealer (excluding common carriers) engages in any of the following activities within Florida:

- Sells a similar line of products as the dealer and does so under a similar business name;
- Maintains an office, distribution facility, warehouse, or similar place of business to facilitate delivery of products or services sold by that dealer to in-state customers;
- Uses trademarks, service marks, or trade names that are the same or substantially similar to those used by the dealer;
- Delivers, installs, assembles, or performs maintenance services for the dealer's Florida customers;
- Facilitates the dealer's delivery of property to customers in this state by allowing the dealer's customers to pick up property at a distribution, warehouse, or similar place of business maintained by the person;
- Conducts any other activities in this state which are significantly associated with the dealer's ability to establish and maintain a market in Florida for the dealer's sales.

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<sup>21</sup> States which have passed a variant of New York-style nexus laws as of March, 2013, include California, Illinois, Georgia, Rhode Island, North Carolina, Texas, Arizona, Vermont, and Connecticut.

<sup>22</sup> Section 212.0596(c), F.S.

The bill also establishes a rebuttable presumption that an out-of-state dealer who makes mail order sales to Florida customers is required to collect taxes if the dealer enters into an agreement with one or more persons (“affiliates”) within Florida under which the Florida affiliate refers (directly or indirectly) potential customers to the dealer.<sup>23</sup> The bill requires annual gross receipts by the dealer of at least \$10,000 in sales by customers referred by affiliates within Florida before this presumption is created.

The bill provides that an out-of-state dealer may rebut this presumption of nexus by proving the in-state affiliates with whom the dealer had an agreement with did not engage in any activity in Florida that was significantly associated with the dealer’s ability to establish or maintain a market in this state. The dealer may offer sworn affidavits from their Florida affiliates as evidence in proving that claim.

The definition of “dealer” in s. 212.06(2), F.S., is revised by the bill to include any person uses within this state an office, distributing house, salesroom, or house, warehouse, or other place of business operated by any person other than a common carrier acting in the capacity of a common carrier.

### Sales Tax Holiday

The bill creates s. 212.0802, F.S., to establish an annual variable length sales tax holiday exempting clothing, shoes and school supplies from the sales and use tax levied under ch. 212, F.S. The length of the holiday will be determined annually by the Revenue Estimating Conference to offset the increased collections caused by the nexus extension provisions described above.

The bill provides for a sales tax holiday to begin on the first Friday of August each year beginning in 2014. During the sales tax holiday, the following items that cost \$75 or less will be exempt from the state sales tax and county discretionary sales surtaxes:

- Clothing (defined as an “article of wearing apparel intended to be worn on or about the human body,” but excluding watches, watchbands, jewelry, umbrellas, and handkerchiefs);
- Footwear (excluding skis, swim fins, roller blades, and skates);
- Wallets; and
- Bags (including handbags, backpacks, fanny packs, and diaper bags, but excluding briefcases, suitcases, and other garment bags).

During the sales tax holiday, the bill will also exempt “school supplies” that cost \$15 or less per item. “School supplies” are defined as pens, pencils, erasers, crayons, notebooks, notebook filler paper, legal pads, binders, lunch boxes, construction paper, markers, folders, poster board, composition books, poster paper, scissors, cellophane tape, glue or paste, rulers, computer disks, protractors, compasses, and calculators.

The bill provides that the sales tax holiday will not apply to sales within a theme park, entertainment complex, public lodging establishment, or airport. Thus, sales of school supplies and related items in these locations would still be subject to taxation during the holiday.

The bill directs the Department of Revenue, in consultation with the Revenue Estimating Conference, to determine the amount of taxes that were collected from out-of-state dealers who would not have been required to collect sales tax but for the changes the bill makes to the treatment of mail order sales. Beginning in 2014, and continuing each year afterwards, the Department shall report to the Governor, Speaker of the House, and President of the Senate the amount of taxes that were collected from such dealers for the 12 month period that ended on April 30 of that year.

Using that collections data for each year provided by the Department, the Revenue Estimating Conference will then determine how many days the sales tax holiday will run for in the upcoming fiscal year. On or before June 1 (beginning in 2014), they shall estimate the number of days required to reduce total sales tax collections by at least the amount of sales taxes collected due to the mail order sale changes.

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<sup>23</sup> Whether by a link on an Internet website, an in-person oral presentation, telemarketing, or otherwise.

If in any year the amount of days determined by that calculation is fewer than three, there will not be a sales tax holiday for that year. Those new collections will be carried forward, unallocated in the General Revenue Fund, until the next year, adding them to the next year's collections until there are enough new collections to fund a tax holiday period of at least three days.

If the number of days calculated is greater than 365, requiring a sales tax holiday that would run past the first Friday of the following year, the collections will be used to permanently reduce the state sales tax rate. The tax rate will be reduced by multiplying each state sales tax rate in ch. 212, F.S., by the difference between one and the ratio determined by the following formula:

- The numerator will be the amount of newly collected taxes from out-of-state dealers for that year, plus any collections carried forward from previous years;
- The denominator will be the sum total of sales tax collections for the upcoming calendar year forecasted by the Revenue Estimating Conference.

#### B. SECTION DIRECTORY:

Section 1. Amends s. 212.0596, F.S., revising the definition of "mail order sale" and extending nexus to dealers who engage in certain activities.

Section 2. Amends s. 212.06, F.S., revising the definition of "dealer" for the purposes of the sales and use tax.

Section 3. Creates s. 212.0802, F.S., establishing an annual sales tax holiday on school supplies, providing the methodology to determine the length of each holiday.

Section 4. Directing the Department of Revenue to make certain reports.

Section 5. Providing an effective date of February 1, 2014.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The Revenue Estimating Conference has not evaluated the proposed committee bill, but on March 1, 2013, it estimated that substantially similar language would have an indeterminate positive revenue impact on state government in the first year of implementation and an indeterminate revenue impact of unknown direction each year subsequently.

##### 2. Expenditures:

N/A

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The Revenue Estimating Conference has not evaluated the proposed committee bill, but on March 1, 2013, it estimated that substantially similar language would have an indeterminate positive revenue impact on local government in the first year of implementation and an indeterminate revenue impact of unknown direction each year subsequently.

##### 2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

If out-of-state retailers begin to collect sales tax, their tax treatment would equalize with brick and mortar retail establishments, which currently operate at a competitive disadvantage. Consumers who make purchases from out-of-state dealers and do not voluntarily remit the use tax due on those purchases would have additional taxes collected on their purchases.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditures of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Mail Order Sales

As mentioned above, some of the states who have enacted similar laws have become faced lawsuits challenging the constitutionality of those laws from affected out-of-state dealers. If this bill were to become law, Florida may be subject to such lawsuits. A state's ability to compel an out-of-state seller to collect and remit sales tax is primarily limited by the Dormant Commerce Clause of the U.S. Constitution.<sup>24</sup>

Upholding a tax imposed by state statute against a Dormant Commerce Clause challenge is dependent upon satisfaction of a 4-part test:<sup>25</sup>

- the tax is applied to an activity with a substantial nexus with the taxing state;
- the tax is fairly apportioned;
- the tax does not discriminate against interstate commerce; and
- the tax is fairly related to a service provided by the taxing state.

The nexus requirement outlined in Complete Auto has generally been interpreted to require that in order to require an out-of-state retailer to collect sales tax the retailer must have a "physical presence" in the state.<sup>26</sup>

In Scripto, Inc. v. Carson, the U.S. Supreme Court held that an out-of-state retailer with agents in Florida was a dealer required to collect and remit Florida sales tax.<sup>27</sup> The agents of the out-of-state retailer represented the retailer pursuant to a contract that authorized the Florida merchants to solicit orders and otherwise obtain business for the retailer in Florida in return for compensation to be paid in the form of a commission.

The U.S. Supreme Court later elaborated in Tyler Pipe Industries, Inc., v. Washington State Dept. of Revenue, that, "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales."<sup>28</sup> The Court found that this standard was satisfied because of the activities of the business's sales representatives in the state.

<sup>24</sup> See AMJUR STATELOCL s. 157; 71 A.L.R.5th 671.

<sup>25</sup> Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

<sup>26</sup> See Quill Corporation v. North Dakota, 504 U.S. 298 (1992).

<sup>27</sup> Scripto, Inc., v. Carson, 362 U.S. 207, 211 (1960).

<sup>28</sup> Tyler Pipe Industries, Inc., v. Washington State Dept. of Revenue, 483 U.S. 232, 250 – 251 (1987).

Many of the cases related to this issue were decided before the emergence of the internet, and thus it is unclear how the case law should be applied to sales over the internet. Several of the states that have enacted similar laws since 2008 have faced lawsuits challenging the constitutionality of their laws. There have been no final decisions on any of those lawsuits.

#### Sales Tax Holiday

The nondelegation doctrine requires that no branch of the government delegate its assigned powers to another branch. Thus, the Florida Legislature cannot delegate the power to make a law; it may only confer the authority to execute the laws it makes. Courts have held, however, that the legislature may transfer subordinate functions to permit administration of legislative policy where there are ascertainable minimal standards and guidelines and it is evident that Legislature has not delegated the power to enact policy or completely determine a law's standards.<sup>29</sup>

That the Revenue Estimating Conference, rather than the Legislature, per se, is tasked with determining the length of the sales tax holiday each year under the bill may raise nondelegation issues. Broadly, the Legislature may not adopt future 'external authority', delegate decision making, or grant the authority to determine what the parameters of a law shall be (without sufficient detail and instruction) to an implementing authority. However, in Jones v. Department of Revenue, the First District Court of Appeals held that the Legislature was permitted to task the Department of Revenue with making projections for tax revenues as the statute in question dealt with, "the field of economics, a highly complex discipline which requires the expertise and flexibility of the agency to deal with 'complex and fluid' conditions."<sup>30</sup>

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

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<sup>29</sup> Sloban v. Florida Bd. of Pharmacy, 982 So. 2d 26 (Fla. Dist. Ct. App. 1st Dist. 2008); State ex rel. Palm Beach Jockey Club v. Florida State Racing Com'n, 158 Fla. 335, 28 So. 2d 330 (1946).

<sup>30</sup> Jones v. Department of Revenue, 523 So.2d 1211 (Fla. 1st DCA 1988).